

OPINION
77-8

June 2, 1977 (OPINION)

Mr. Glenn Dill
Attorney at Law
Kenmare, ND 58746

Dear Mr. Dill:

This is in response to your letter of 18 May 1977, as city attorney for a named city, indicating that the city request an official Attorney General's opinion on the question of:

"Can the Auditor of a City also be appointed Chief of Police?"

Statutes you cite would indicate that the city in question is a council, as opposed to a commission, type city.

You indicate that you have advised the city that Section 40-14-07 of the North Dakota Century Code which prohibited the Auditor from holding other offices has been repealed; that Section 40-16-04(17) allows the Council to assign such duties to the Auditor as the Council may direct, and that Section 40-14-04 does not require the appointment of a separate Chief of Police in Mayor-Council cities.

Your letter of inquiry further defines the question that was asked of you as follows:

Whether the Auditor can be utilized as a de facto city manager by appointing him also Chief of Police and Deputy Street Commissioner. (The City Engineer would serve as Street Commissioner without daily supervisory duties.)"

You indicate that your answer is yes, but that the Auditor cannot be paid a separate salary for the additional positions according to Section 10-16-01.

Our last response to an inquiry with regard to this subject matter more or less indicated that the provisions of Section 40-14-07 would prevent the combining of these two offices (See letter of 14 October 1969, photocopy of which is enclosed herewith). The 1975 repeal of said Section 40-14-07, which you mention, would, of course, remove the reason on which the 1969 letter was based. However, as pointed out in our letter of June 1, 1976 (See photocopy of same, also enclosed), the 1975 act does not affirmatively specify that the Auditor may hold other city offices, on which basis the question of common law incompatibility between the offices of City Auditor, Chief of Police and Deputy Street Commissioner remains. We have previously held that the offices of City Auditor and City Assessor may be held by the same person, (partially on the basis of statutes affirmatively indicating compatibility between such offices) (See letter of this office of date February 4, 1976, photocopy of which is also enclosed herewith). We have not had occasion to pass on compatibility of the offices you mentioned since the 1975 statutory change.

The only possible bases upon which a common law incompatibility between the offices of City Auditor, Police Chief and Deputy Street Commissioner could be based would be outlined by Sections 40-11-08, 10-14-06 and 40-18-08 of the North Dakota Century Code.

Thus the City Auditor is the official custodian of the city's ordinances, and certifies the ordinance book where it is necessary to produce same in evidence, (Section 40-11-08). The City Auditor (together with the mayor) signs the warrants commissioning other officers, presumably including the Police Chief and excepting only the City Auditor, Alderman and Mayor. (40-14-06). Also, of course, the Municipal Judge is required to pay fees into the city treasury (now, with the elimination of that office, the city auditor does act as city treasurer) and at the end of the month the Municipal Judge shall make and file with the City Auditor, a written report, under oath, showing an account of all fees collected by him in appropriate actions during the preceding month and showing the actions in which the fees were collected. (40-18-06).

While all of these reasons may make it less desirable for the City Auditor to hold these other offices, we do not believe that they create an actual "conflict" between the offices concerned. While the defendant in a criminal case before the city magistrate may not like to have the ordinances against his actions proven by the certification of the same person as arrested him, or to have to prove ordinance provisions in his defense through the certification of the same person as arrested him, the Auditor in such a case is not expressing an opinion as to the meaning or effect of the ordinances in question, he is merely acting as the record keeper of the governing body, certifying as to what ordinances do or do not exist. As to his signature to warrants commissioning himself as Chief of Police, he, from the general scope of his other duties, merely is attesting the signature of the chief executive officer of the city, rather than expressing a separate decision made in his own right. As to his accounting with the Municipal Judge, he is merely acting as accounting officer of the city which should not influence the Municipal Judge's decisions. On such basis, we conclude that there is no common law incompatibility between the offices of City Auditor, Chief of Police and Deputy Street Commissioner.

While we do not necessarily encourage the holding of these three separate offices by the same person, we find no inherent incompatibility between these offices, find no legal objection to same and conclude that the City Auditor can also hold the office of Chief of Police and Deputy Street Commissioner.

Sincerely,

ALLEN I. OLSON

Attorney General